

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

SAO-16-2023 (O&M)
Reserved on: 16.02.2024
Date of decision:05.04.2024

Priya Diwan
....Appellant

Versus

Manohar Lal Kataria and another
..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. V.K.Jindal, Sr. Advocate with
Mr. Amandeep Vashisht and
Mr.Pankaj Gautam, Advocates for the appellant

Mr. Kanwaljit Singh, Sr. Advocate with
Mr. Ramesh Kumar Bamal, Advocate and
Mr. Amit Jain, Advocate for
for respondent no.1

Mr. Parminder Singh Kanwar and
Ms.Aashna Gill, Advocate for respondent no.2-
UT, Chandigarh

ANIL KSHETARPAL, J

1.Brief facts of the case

1.1 The defendant no.1 has filed this Second Appeal against order to challenge the correctness of the remand order passed by the First Appellate Court directing the trial court to frame the most important issue with respect to the Will propounded by the plaintiff and thereafter, decide the matter afresh.

1.2 In order to comprehend the issues involved in the present case, some relevant facts, in brief, are required to be noticed.

1.3 Late Sh.Sudarshan Kumar Kataria was owner of plot no.68, Sector 16-A, Chandigarh. He was residing in United Kingdom. The plaintiff late Brig.Manohar Lal Kataria claims the property on the basis of two Wills allegedly executed by late Sh.Sudarshan Kumar Kataria in February, 2005 and 26.10.2005 whereas the appellant (defendant no.1) Dr. Priya Diwan is the daughter of late Sh.Sudarshan Kumar Kataria. She claims the property on the basis of natural manner of succession i.e intestate succession.

2. Issues framed by the trial court and its decision:-

2.1 From the pleadings of both the parties, the following issues were framed by the trial court:-

“1. Whether the plaintiff is entitled for declaration as prayed for? OPP.

2. If issue No.1 is proved in affirmative, whether the plaintiff is entitled for mandatory injunction as prayed for? OPP.

3. Whether the suit is bad for want of notice u/S 80 CPC? OPD.

4. Whether the suit filed by the plaintiff is wholly misconceived?OPD.

5. Relief.”

2.2 The plaintiff's suit was dismissed by the trial court vide judgment dated 03.07.2018, against which the plaintiff filed an appeal. The First Appellate Court has remitted the case back to the trial court with direction to frame proper issues with regard to the Wills and record fresh finding on issue no.3.

3. Arguments put forth by the learned counsel representing the parties:-

3.1 Heard the learned counsel representing the parties at length and with their able assistance perused the paperbook.

3.2 Learned senior counsel representing the appellant (defendant no.1) has submitted as under:-

- i) The order of remand is erroneous because there is non-compliance of Order XLI Rule 23, Rule 23-A and Rule 24 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC')
- ii) The plaintiff cannot be allowed to fill up the lacunas in his case by obtaining an order of remand.
- iii) It is not permissible to invoke the provisions of remand in routine and imprudent manner.
- iv) In a situation where it is coherent that the non-framing of distinct issue would not vitiate the trial, particularly when the plaintiff knew their case, the order of remand is not justified.

3.3 On the other hand, the learned counsel representing the respondents submits that as per Order XIV Rule 1 CPC, the court was required to frame a distinct and separate issue on each material proposition affirmed by one party and denied by other. He submits that the plaintiff has propounded the Will, which is denied by defendant no.1. Hence, the court was required to frame a distinct and separate issue allowing the plaintiff to lead evidence in support of his contention.

4. Discussion by this Court:-

4.1 This Court has considered the submissions made by the learned counsel representing the parties.

4.2 In fact, the vital issue between the parties is with respect to the correctness and validity of the two Wills allegedly executed by late Sh.Sudarshan Kumar Kataria, in February, 2005 and 26.10.2005. The Will dated 26.10.2005 is an exact duplicate of the Will executed in February, 2005 which is authenticated by Consulate General of India, apart from being attested by two witnesses. The Will dated 26.10.2005, is notarized, recorded and embossed by the Chandigarh Administration.

4.3 Unequivocally, Order XIV Rule 1 CPC mandates the court to settle issues when a material proposition of fact or law is affirmed by one party and denied by the other party. According to this provision, each material proposition affirmed by one party and denied by the other shall be made a distinct issue while framing the issues. In this case, the trial court overlooked the mandatory provision enshrined in Order XIV Rule 1 CPC. There is a likelihood of prejudice to the plaintiff if a distinct issue with respect to the validity of Will is not framed. In these circumstances, the First Appellate Court found it appropriate to remand the case back to the trial court for decision afresh.

4.4 With reference to the first submission put forth by the learned counsel representing the appellant, it may be noted that Order XLI Rule 23-A CPC permits the appellate court to pass an order of remanding the case back to the trial court when the decree is reversed in appeal and retrial is considered necessary. In this case, it has been found by the First Appellate Court that the plaintiff did not examine one attesting witness, which is mandatory under Section 68 of the Indian Evidence Act, 1872. The First Appellate Court while deciding the

matter came to the conclusion that this may have happened due to the failure of the trial court to frame distinct issue with regard to the validity of Will. In these circumstances, the First Appellate Court has formed an opinion that a retrial is considered necessary. Thus, the second part of Order XLI Rule 23-A CPC has been fulfilled. With regard to the first part of Order XLI Rule 23-A CPC, it may be noted that the trial court decided the suit without framing the most important issue, which arose between the parties. Thus, the First Appellate Court has reversed the judgment and decree passed by the trial court. Order XLI Rule 24 CPC enables the Appellate court to finally decide the case where the evidence on record is sufficient. It is significant to note that Order XLI Rule 24 CPC is applicable only if the appellate court, after re-settling the issues, came to the conclusion that the evidence, which has already been led is sufficient to enable the appellate court to pronounce the judgment. In this case, as already noticed, the First Appellate Court has found it appropriate to remand the matter back to the trial court because none of the attesting witnesses of both the Wills have been examined and evidence on the record has been found insufficient.

4.5 The second argument of the learned counsel representing the appellant lacks substance because trial court failed to settle the proper issues arising between the parties, hence, proper issues were not culled out. In order to give proper opportunity to both the parties to lead evidence, the appellate court has directed the trial court to identify a distinct issue on the validity and genuineness of the Will executed in February, 2005 and 26.10.2005. Hence, it is crystal clear that the First

Appellate Court by using its judicial wisdom and in accordance with law remanded the case back to the trial court and it has not been done to permit the plaintiff to fill the lacunas in his case.

4.6 In support of his submission no.3, the learned senior counsel has relied upon the recent judgment passed by the Supreme Court in **Shiva Kumar and others vs. Sharanabasappa and others (2021) 11 SCC 277**. This Court has carefully read the aforesaid judgment. In that case, the Supreme Court found that the parties have adduced all their relevant evidence and the appellants have not been denied any opportunity to produce any particular evidence. It was in that context the Supreme Court declared that the order of remand may not be passed in a routine manner. The facts of the case at hand are wholly different. At the cost of repetition, the trial court has failed to frame proper issues arising between the parties and failed to adjudicate upon the important issue, which arose in the suit. Hence, the impugned order passed by the First Appellate Court remanding the case back to the trial court is not reckless and imprudent and it has not been passed in a casual manner.

4.7 The last submission of the learned counsel representing the appellant also lacks substance. As per Order XIV Rule 1 CPC the duty is cast upon the court to frame proper issues with respect to each material proposition affirmed by one party and denied by the other. In this case, the basic and fundamental issue between the parties was not identified by the trial court.

4.8 In these circumstances, it results in vitiating the trial of the suit. Hence, the judgment relied upon by the learned counsel representing the appellant is not applicable to the facts of the present case.

5. **Decision:-**

5.1 Keeping in view the aforesaid discussion, this Court is of the considered opinion that the impugned order passed by the First Appellate Court does not warrant any interference. Hence, the appeal is dismissed.

5.2 All the pending miscellaneous applications, if any, are also disposed of.

05.04.2024

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Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No

(ANIL KSHETARPAL)

JUDGE